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IN THE

Supreme Court of the United States

October Term, 1945

No.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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Northern Pacific Railway Company, a Wisconsin corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered herein on the 8th day of July, 1946.

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Wisconsin (R. 8-18) is reported in 66 F. Supp. 1. The opinion of the United States Circuit

Court of Appeals for the 7th Circuit is set out in the record on pages 52 to 58.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 8, 1946 (R. 58). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Petitioner, a common carrier subject to the Interstate Commerce Act, was entitled under the provisions of Section 321(a) of the Transportation Act of 1940, 54 Stat. 898, 954, 49 U. S. C. 65(a), notwithstanding the exception therein contained of "military or naval property of the United States moving for military or naval [redacted] and not for civil use", to charge the full applicable commercial rates for transportation for the United States of any of the following property:

(a) copper cable shipped in August 1941 consigned to District Material Officer, 13th Naval District, Tacoma, Washington, c/o Seattle-Tacoma Shipbuilding Corporation, for use by the Shipbuilding Company in installing degaussing equipment (to neutralize magnetic mines) under specifications furnished by the Navy, in the hull of a cargo vessel being constructed for the Maritime Commission;

(b) lumber shipped in January and February, 1942, consigned to the United States Area Engineer, Twin Cities Ordnance Plant, New Brighton, Minnesota, c/o Foley Brothers, Inc. and Walbridge Aldinger Company for use by the contractors in the construction of an ord-

nance plant erected by the War Department for the manufacture of ammunition;

(c) lumber shipped in May 1943 consigned to Depot Quartermaster, Minneapolis, Minn., c/o Crown Iron Works, to be treated, dried, milled, and manufactured by the Iron Works into trestle balks and ponton balks, sills, and chess, for use by Combat Engineers of the Marine Corps in erecting bridges for military use;

(d) bowling alley outfits shipped in February 1942 consigned to the Officer in Charge, Siems-Drake, Puget Sound Company, Seattle, Washington, for reshipment to Naval Air Base, Dutch Harbor, Alaska, for installation there in a recreation center being constructed for use initially by civilian employees of the contractor and later by military personnel;

(e) liquid paving asphalt shipped in January, 1942, consigned to Civil Aeronautics Administrator, Alaska Project Warehouse, Seattle, Washington, for use by him in constructing runways at an airport at Cold Bay, Alaska, on land reserved by Executive order for use of the Navy.

STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940 are printed as Appendix "A" for convenient reference. Section 321(a) provides that commercial rates shall be paid for transportation by any common carrier subject to the Act of property for or on behalf of the United States; except for transportation of "military or naval property of the United States moving for military or naval and not for civil use". Sec. 321 (b) provides that if any carrier or its predecessor in interest shall have received a grant of lands from the United

States to aid in construction of any part of its railroad, its compensation shall be determined as though subsection (a) had not been enacted until it shall have filed a release with the Secretary of the Interior of any claims it may have against the United States for additional lands or compensation for expropriated lands granted to such carrier or predecessors in interest in aid of construction of its railroad.

STATEMENT

This suit was brought under the Tucker Act (28 U. S. C. A., Section 41(20)) to recover amounts deducted from freight bills for subsequent transportation because of claimed overpayment of bills at comercial rates for transportation of five shipments of Government property.

The case was tried on a stipulation of facts, adopted as Findings of Fact. (R. 18) Petitioner, and other carriers concerned, prior to performance of the transportation, filed releases under Sec. 321 (b). By the decision of this court in *United States* v. *Northern Pacific Railway Company,* 311 U. S. 317, it was adjudged that petitioner was entitled to patents to 428,986.68 acres, valued at approximately $1,400,000, which it duly released; and also released claims which it asserted against the United States for compensation for 1,453,061.02 acres of expropriated lands which it claimed to be of the fair value of $14,468,649.06. (R. 21)

The five shipments are described in the findings (R. 22), and opinion of the Court of Appeals (R. 53, 54), as follows:

1. *Copper Cable.* A shipment in August 1941 from Pawtucket, Rhode Island, to Tacoma, Washington, for contract Nos. 88648, of 15,780 pounds of insulated copper cable by

inspector of naval material to District Material Officer, c/o Seattle-Tacoma Shipbuilding Corporation, for Maritime Commission, Hull 123. The cable was furnished by the Navy Department for use in installation of degaussing equipment (to neutralize magnetic mines) on Hull 123, a cargo vessel being built by the shipbuilding corporation under contract dated October 9, 1939, with the Maritime Commission. Article 9 of the Maritime Commission contract provided that, until the emergency declared by the President in proclamation dated September 8, 1939, shall cease to exist, the vessel shall be operated to and from such ports and under such conditions as the Commission shall direct. The vessel was delivered September 8, 1941, and was operated as directed by the Maritime Commission or war shipping administration. (R. 22)

2. *Lumber for Construction of Munitions Plant.* Shipments in January and February, 1942, from the State of Washington to New Brighton, Minnesota, of seven carloads of lumber by various lumber companies consigned to U. S. Area Engineer, Twin Cities Ordnance Plant, care of Foley Brothers, Inc., and Walbridge, Aldinger Company, for construction by those contractors of Twin Cities Ordnance Plant at New Brighton for manufacture of .30 and .50 caliber ammunition. (R. 24)

3. *Lumber for construction of Pontons.* Shipment in May 1943, from Bucoda, Washington, to Minneapolis, Minnesota, of fir lumber by Mutual Lumber Company, consigned Depot Quartermaster, care Crown Iron Works, for United States Marine Corps. The lumber was to be treated and manufactured into trestle balks and ponton balks, sills

and chess at Crown Iron Works pursuant to a contract. Upon completion, the balks were shipped overseas for construction of a bridge for use in military operations, or were used for construction of ponton bridges or piers at Camp Lejune, North Carolina, and Quantico, Virginia, for training of combat engineers. (R. 27)

4. *Bowling Alleys.* Shipment February 13, 1942, from Muskegon, Michigan to Seattle, Washington, of bowling alley outfits by Inspector of Naval Material to Officer in Charge, Siems-Drake Puget Sound Company, Seattle, Washington, for reshipment to Naval Air Base, Dutch Harbor, Alaska, Contract NOy3570. That contract was entered into under the Act of April 25, 1939, and Act of May 25, 1939, authorizing construction of naval air bases at Kodiak and Sitka, Alaska. The contract provides that recreational facilities may be installed as approved by the contracting officer. The bowling alleys were procured on contractor's purchase order and installed in a building at Dutch Harbor. The building was intended for recreational center for contractor's men, and later for military personnel. (R. 28)

5. *Liquid Paving Asphalt.* Shipment January 26, 1942, from Richmond, California, to Seattle, Washington, of 1,259 barrels of liquid paving asphalt consigned to Civil Aeronautics Administrator, Alaska Project Warehouse, Seattle, Washington, for export. The asphalt was for use in constructing runways at an airport at Cold Bay, Alaska, under program entitled "Development of Landing Areas for National Defense", conducted by Civil Aeronautics Administration. The airfield was afterwards used by naval planes in the defense of Alaska. (R. 31)

All shipments were transported on Government bills and were, when made, Government property.

The District Court and Circuit Court of Appeals held that each of said shipments was military or naval property within the above-quoted exception of Sec. 321 (a), to which land grant rates apply, and dismissed petitioner's action. (R. 18, 35, 56).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the ~~Eighth~~ Seventh Circuit erred:

1. in holding that the United States was entitled to land grant rates on all or any of the shipments of government property above described;

2. in holding that each of said shipments was military or naval property within the meaning of the exception in said Sec. 321 (a) Transportation Act, 1940;

3. in holding that each of said shipments was moving for military or naval and not for civil use within the meaning of said exception; and in holding that "this exception was for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress";

4. in holding that any property the Government used to forward its total war effort was military or naval property, and if owned by the Government and transported over land grant railways was the kind of property Congress did not release from the reduced rates granted by the land grant railways.

REASONS FOR GRANTING THE WRIT

The Government contends that all shipments of property having any connection with national defense or prosecution of the war are for military or naval use and so entitled to land grant rates. The railroads contend that materials, tools, machinery, etc., used for manufacture of munitions and other military articles; materials and machinery for construction of plants for manufacture of munitions or other military articles; materials and machinery for construcion of recreation facilities for use of a contractor's employees engaged in construction of military or naval facilities; materials and machinery for construction of cargo vessels by the Martime Commission; are not military or naval property moving for military or naval and not for civil use.

This is a test case to obtain an authoritative construction of Sec. 321, Transportation Act, 1940.

Millions of shipments of Government property like or similar to those in question were made during the war years. Freight bills were submitted by the railroads at commercial rates and paid in full under Sec. 322. As audits progressed, very large amounts have been deducted from current bills for other transportation. There are outstanding awaiting audit a vast number of bills claimed to have been overpaid on account of which very large sums will be deducted as audits are completed. There are pending in the Court of Claims suits for large amounts filed by various railroads in which the same or similar questions are presented for decision.

Petitioner is informed that this Court has granted certiorari in Nos. 942 and 943, involving the application of

Sec. 321 (a) to shipments of fertilizer to Great Britain under the Lend-Lease Act. The decision in those cases will not answer the questions presented in this case. An authoritative decision in this case is more urgent than in Nos. 942 and 943, because of the much greater volume of shipments like those in question here and the much larger amount involved.

SUMMARY OF ARGUMENT

If the petition for certiorari be granted, petitioner will elaborate the following points:

1. The Described Shipments are Neither Military nor Naval Property, nor Were They for Military or Naval Use Within the Plain Meaning of Sec. 321 (a).

The definitions of "military" and "naval", quoted in the opinion of the District Court, (R. 14), are as follows:

> "Military"—"of or pertaining to soldiers, arms or war; belonging to, engaged in, or appropriate to the affairs of war; according to the methods and customs of war or armies";
>
> "Naval"—"of or pertaining to ships or shipping; of or pertaining to or connected with, possessing or characteristic of vessels of war or a navy."

Lumber for the construction of a munitions plant or for manufacture of pontons; materials and machinery for construction of cargo vessels, etc., are not *per se* military property. Those articles, when transported for delivery to contractors for constructing a munitions plant, manufacturing

pontons or building a cargo vessel, etc., were not for military use because manufacturing is a civil, not a military or naval activity. It is immaterial that the manufactured article may be military property, because that was not transported. The ingredients and materials used in the manufacture of military property completely lose their identity in the completed article. Tools and machinery are the *instruments of production.* It is as incorrect to say that construction materials, machinery and ingredients used in production are military or naval property as to say that the civilian employes of the contractor were members of the military or naval forces. Attorney General Palmer ruled that an embargo prohibiting exportation of certain articles, including arms, munitions and explosives, did not include machinery for production of those articles. (32 O. A. G. 132) The application given to Sec. 321 (a) by the court below is diametrically opposed to the Attorney General's opinion. Yet that opinion appears to have established the form for legislation of this kind followed ever since. Congress, in other contemporaneous war legislation, observed Attorney General Palmer's opinion, and expressly described "ingredients, component parts, tools, machinery," etc., used in production of the articles concerning which it was legislating. Had Congress intended that Sec. 321 (a) should have the meaning and application given to it below, it would have used express language, as it did in much other contemporaneous war legislation. Thus, in further amending the Anti-Sabotage Act of 1918 (40 Stat. 533) by the Act of August 21, 1941 (55 Stat. 655), Congress defined the words "national-defense material" as follows:

"§104. Definition of national-defense terms:

"The words 'national-defense material', as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof, intended for the use of the United States in connection with the national defense *or for use in or in connection with the producing, manufacturing, repairing, storing mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.*"

The Embargo Act of July 2, 1940 (54 Stat. 712), Sec. 6, defines the subject matter as follows:

"Sec. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, *or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof,* he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. * * *"

The Property Requisitioning Act of October 16, 1941 (55 Stat. 742), is as follows:

"That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, *or component parts thereof, or machinery tools, or materials necessary for the manufacture, ser-*

vicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States * * * "

S. B. 2009, which became Transportation Act, 1940, was introduced in the Seventy-Sixth Congress and enacted September 18, 1940, including Sec. 321. It is impossible to believe that Congress intended that the phrase, "military or naval property moving for military or naval use" should include "component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation thereof." The phrase, as used in Sec. 321, obviously and by plain meaning applies, and was intended to apply, *only to articles shipped to or for use by military or naval personnel as distinguished from* shipments of construction materials, tools and machinery for use of contractors *in manufacturing military or naval property.*

2. The Military and Naval Property Exception in Sec. 321, if of Doubtful Meaning, Will be Strictly Construed.

It is a cardinal rule that an exception contained in a remedial statute will be strictly construed. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299; *Gregg Cartage Company* v. *United States,* 316 U. S. 74; *Pennsylvania R. Co.* v. *United States,* 54 Fed. Supp. 381.

That Sec. 321 (a) is highly remedial, intended to reduce the burden on the railroads resulting from the enormous increase in Government transportation at the inadequate 50 percent of tariff rates, and to limit the discriminations be-

tween places and shippers which were wrecking the policy declared by the Interstate Commerce Act, is established by the report of the House Committee on H. R. 4184, to repeal land grant rates, which is now law. The full report was exhibited to the courts below and will be filed in this court. The conclusion of the committee recommending passage of the bill is printed as Appendix "B".

It is submitted that the court below erred in holding that "this exception was for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress."

3. Sec. 321 was an Offer of Partial Relief From the Railroads' Transportation Obligations, and Upon Acceptance by Filing the Release of Claims for Additional Lands Due Under the Grants and Compensation for Expropriated Lands, a CONTRACT Resulted.

The original grant to the Northern Pacific (13 Stat. 365), followed by construction of the railroad, became a *contract. United States* v. *Northern Pacific R. Co.*, 256 U. S. 51. Sec. 321 is an offer of amendment which, upon acceptance by the company, became a term of the original contract. Petitioner made a very considerable sacrifice in releasing lands to which it had been adjudged entitled by this Court of the approximate value of $1,400,000, and claims for expropriated indemnity lands in forest reserves within the limits of its grant of approximately $14,468,649. Other land grant railroads released claims to large amounts of land, all totaling about 8 million acres. Although it is not suggested that Congress balanced the loss against gain, nevertheless, the

consideration was deemed sufficient, especially considering the urgent public policy stated by the House Committee. (Appendix "B"). The original land grant contract has been given a reasonable construction in accordance with the plain meaning of the language used. *United States* v. *G. H. & S. A. Ry Co.*, 279 U. S. 401, presented the question whether mounts of cavalry officers, owned by them although the government paid transportation charges, were property of the United States within the land grant acts. The court said:

> "The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.* When considering another question arising under a like provision in a land grant Act, this Court said: 'It might be very convenient for the government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the usus loquendi is a far more valuable aid than the inquiry what might be desirable.' *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, 454."

Considering Sec. 321 and filing of the release of lands and claims as a contract, the decision below is in direct conflict with this case in holding that the section "was for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress." It is no less immoral for the Government to impair the

rights of parties under legislative contracts by subsequent legislation (*Sinking Fund Cases*, 99 U. S. 700), than to accomplish the same result by judicial construction, a result which this Court has consistently refused to sanction. *United States* v. *Standard Rice Co.*, 323 U. S. 106, and cases there cited.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

July 31, 1946.

APPENDIX "A"

TRANSPORTATION ACT, 1940

PART II—Rates on Government Traffic

GOVERNMENT TO PAY FULL RATES

Sec. 321 (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That Section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be

procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

DEDUCTION OF OVERPAYMENTS

Sec. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

APPENDIX "B"

EXCERPT FROM COMMITTEE'S REPORT ON BOREN BILL—H. R. 4184

"It is the conclusion of the committee that through the years the Government has gotten all and more than it bargained for in the original land-grant transaction. A statement issued by the General Land Office in 1941 summarized the situation by saying that in return for an 'empire of land' the Government got a transportation system that 'won the West and established a Nation stretching from the Atlantic to the Pacific Ocean.'

"Since that time, however, the Government has received as further and additional consideration on this deal land-

grant deductions amounting to at least $500,000,000. The Committee is of the opinion that the time has come for the Government to close its books on this transaction.

"This conclusion is strengthened by the committee's examination of the actual working in practice of the land grant deduction system. It produces results inconsistent with our transportation policies. Businessmen must deal in the dark as to the rates paid by their competitors where Government contracts are involved, while there is discrimination in rates as among those shippers in position to take advantage of land-grant deductions and those not so situated.

"It is, therefore, the conclusion and recommendation of the committee that this bill to eliminate land-grant deductions should pass. Simple justice demands it; the public interest requires it.

"Among the desirable results to be expected from the enactment of the bill are the following:

"It will remove the discriminations under which industries now labor in competing for sales to the Government by placing them, so far as freight rates are concerned, in the same position with respect to such sales as they are with respect to transactions with private individuals and concerns.

"It will assure all shippers, agricultural and industrial, that their freight bills do not contain hidden taxes to make up for deficiencies in the charges paid by the Government on its traffic.

"It will result in relieving both the Government and the railroads of large expense by removing a source of unending

controversy and litigation between them and by eliminating the necessity for an inordinate amount of accounting and other clerical work in connection with Goverment traffic.

"It will relieve the land-grant railroads of the injustice of being required to continue to make payments on a debt that was long since extinguished.

"It will relieve carriers that received none of the granted lands, including the motor carriers and water carriers as well as the great majority of the railroads, from the injustice of being compelled to reduce their charges on Government traffic in order to meet the competition of the land-grant lines.

"It will remove from the forwarders which received no land grants, the threat of being required to submit to the land-grant deductions on Government traffic handled by them over land-grant lines.

"It will relieve the railroads of uncertainties as to their present revenues and thus enable them to plan more intelligently to meet the inevitable uncertainties of the future."